# Stakeholder Sentencing

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## Introduction

Recent years have witnessed increasing interest in how to provide new avenues for incorporating a greater public voice in sentencing (see Roberts and Hough 2005; Ryberg 2010). This development is the product of a widely perceived growing crisis concerning the lack of public confidence in sentencing decisions. One important factor is negative media headlines that draw attention to cases that contribute to feeding a culture of sentencing disapproval by the public where punishments are believed to be undeservedly lenient. A second factor is the recognition that victims should have greater involvement in the criminal justice system, including sentencing decisions. But how might we improve public confidence and provide a greater voice for victims without sacrificing criminal justice in favour of mob rule?

These developments concerning the relation of public opinion and punishment raise several fundamental concerns. How much voice, if any, should the public have regarding sentencing decisions? Which institutional frameworks should be constructed to better incorporate public opinion without betraying our support for important penal principles and support for justice?

This chapter accepts the need to improve public confidence about sentencing through improving avenues for the public to posses a greater and better informed voice about sentencing decisions within clear parameters of justice. I will defend the idea of *stakeholder sentencing*: those who have a stake in penal outcomes should determine how they are decided. This idea supports an extension of restorative justice I will call *punitive restoration* where the achievement of restoration may include a more punitive element, including imprisonment. My argument is that the idea of stakeholder sentencing offers a compelling view about public opinion might be better incorporated into sentencing that promotes a coherent and unified account of how punishment might pursue multiple penal goals, including improving public confidence in sentencing.

## I. The Problem of the Public

A powerful argument against greater incorporation of public opinion in sentencing decisions is that a larger public voice would contribute to disproportionate punishments. Justice is best served through ensuring punishments are proportionate and not by tailoring outcomes to those more favoured by the public.

The idea that the public might be more likely to endorse disproportionate punishments, especially overly severe sanctions, is understood to be a compelling reason why the criminal law has endorsed victim displacement. The concern is that punishments would become too harsh and injustices practised if the victims determined the appropriate punishments for their offenders. This runs together separate issues that may bear on how we determine sentencing: the first is the voice of victims and the second is the input by the general public. If the general public should be able to have some input on sentencing, then it is often submitted that victims in particular should have a voice rather than remain silent. (O'Hara 2005)

Victims were traditionally displaced from decisions about sentencing in order to best promote justice through a better guarantee of consistency and proportionality:

> we seem to have lost sight of the origins of the criminal law as a response to the activities of *victims*, together with their families, associates and supporters. The blood feud, the vendetta, the duel, the revenge, the lynching: for the elimination of these modes of retaliation, more than anything else, the criminal law as we know it today came into existence (Gardner 1998: 31).[1]

Victim displacement helped end the private pursuit of justice against offenders by private citizens and promote the rule of law. We should not serve as judges in cases where we have an interest in the outcome, for John Locke, because of the danger that victims will be 'partial to themselves and their friends' at the expense of others (2004: 275). Decisions should be impartial to secure justice. This may be best guaranteed by ensuring that those with a special interest in sentencing decisions should not possess much influence over how these decisions are made.

The concern that a greater public voice would contribute to overly severe sanctions is thought to receive support from populist proposals, such as California's so-called 'Three Strikes and You're Out' law where offenders convicted of a third strike-eligible crime face a minimum 25 years in prison (Cullen et all, 2000; Zemring, et al 2001). These proposals have proven counterproductive from the perspective of effective criminal justice policy. Studies have concluded that California has benefited from at best a negligible deterrent effect of 2 per cent or less alongside an explosion in the prison population and associated costs.[2] If this is the kind of criminal justice policy the public most wants, then it may lead to a far more expensive system for little, if any, effect on crime reduction and improved public safety.

But must a greater public voice result only in support for overly harsh sentencing? It is not inconceivable to imagine popular celebrities commanding wide support for a more lenient sentence or perhaps a pardon. The core issue is not that the public might support more punitive sentences, but that sentencing decisions may become more arbitrary and less uniform where similar cases may be treated too differently and, thus, unfairly. The claim that the public are more likely to endorse disproportionate punishments is a statement about the failure of the public to properly account for proportionality more generally. This may be explained by the fact that the public may often have an inaccurate, perhaps even irrational, fear about crime and likely future victimhood (Cook and Lane 2009; Hutton 2005; Lai et al, 2012; Roberts et al 2003). The public is also often mistaken about the potential benefits of more punitive penal policies (Williams 2012). If the public has inaccurate or incomplete information about relevant factors, then it cannot be expected to arrive at any satisfactory judgement in sentencing matters. And yet criminal justice must command public confidence if it is to command satisfactory legitimacy and be effective. Otherwise, the public might turn to 'take the law into their own hands' and undermine the rule of law.

The *problem of the public* is that we must secure public confidence despite the fact that the public possesses deep epistemic problems. A greater public voice might only secure higher confidence at the cost of abandoning evidence-based sentencing policy on how crime reduction and other penal goals might be achieved. How might we achieve public confidence without falling into this trap?

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[1] See Doak (2005) and for criticisms see Edwards (2002).

[2] See Durlauf and Nagin 2011: 28 and also *Brown v. Plata*, 563 U.S. (2011).

I believe that this trap may be avoided. We should first recognise that the issue is not whether public opinion matters, but rather how much it should matter. This is because the idea that the public should have a voice in sentencing is deeply entrenched in its democratic institutions. The public indirectly exercises its voice on the criminal law through electing political leaders that help shape the future contours of the criminal law and the criminal justice system more generally.[3] The public has a more direct voice as lay magistrates or juries. Many countries have long established practices where the public may participate in sentencing decisions. One example is the use of lay magistrates in the United Kingdom to determine the punishment of less serious criminal offences (Darbyshire 2002, Grove 2003, Roberts et al 2012). Several Continental jurisdictions allow for the sentencing of more serious offences to be determined by lay magistrates sitting alongside professional judges. Additionally, the use of civilian juries to determine monetary awards and offender punishment after a conviction is secured is well established in many jurisdictions as well (Brooks 2004a, 2004b, 2009). Juries are often used in trials concerning more serious offences. Juries in the United States are also entrusted with determining sentences in capital trials, including whether a convicted offender should be executed.[4] Furthermore, judges are increasingly permitted to consider victim impact statements in determining penal outcomes. These statements are presented in court and detail how a crime has affected victims and their relations. Victim impact statements have had an awkward reception by the courts where the impact on victims may be relevant in sentencing, but not normally victim opinions about sentence preferences (Brooks 2012a: 72-73).[5]

These examples confirm that the idea that the public should have a voice about sentencing is widely entrenched through democratic institutions. This fact does not render the idea uncontroversial. The issue is not whether public opinion should be less, but rather whether it should be more. It is widely held that public confidence in the criminal justice system is an important source of democratic legitimacy (Bennett 2013). This does not require that every outcome receives popular approval, but rather that the overall system has satisfactory public support. This is because citizens are governed by the rule of law rather than the tyranny of the majority. So the lack of public confidence may represent a problem of legitimacy concerning sentencing outcomes.

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[3] This view supports the observation by Joseph Schumpeter that democracy is not rule by the people, but rather rule by politicians elected by the citizenry (1942: 284-85).

[4] See *Ring v. Arizona* (2002), 536 U.S. 584, 122 S.Ct. 2428.

[5] There are exceptions for some US states where victims are permitted to offer sentencing recommendations. On victim rights and US states, see Twist (2003) citing Ala. Const. amend. 557; Alaska Const. art. I, Sec. 24; Ariz. Const. art. II, 2.1; Cal. Const. art. I, 12, 28; Colo. Const. art. II, 16a; Conn. Const. art. I, 8(b); Fla. Const. art. I., 16(b); Idaho Const. art. I, 22; Ill. Const. art. I, 8.1; Ind. Const. art. I, 13(b); Kan. Const. art. 15, 15; La. Const. art. 1, 25; Md. Decl. Of Rights art. 47; Mich. Const. art. I, 24; Miss. Const. art. 3, 26A; Mo. Const. art. I, 32; Mont. Const. art. II, sec. 28; Neb. Const. art. I, 28; Nev. Const. art. I, 8; N.J. Const. art. I, 22; New Mex. Const. art. 2, 24; N.C. Const. art. I, 37; Ohio Const. art. I, 10a; Okla. Const. Art. II, 34; Or. Const. art. I, sec. 42; R.I. Const. art. I, 23; S.C. Const. art. I, sect. 24; Tenn. Const. art. I, 35; Tex. Const. art. I, 30; Utah Const. art. I, 28; Va. Const. art. I, 8-A; Wash. Const. art. 2, 33; and Wis. Const. art. I, 9m.

While there is no argument for *reducing* the public voice, it is questionable whether it could be less than it is. Relatively few cases ever proceed to trial, perhaps no more than 5-7% (Brooks 2004a: 201). Fewer receive decisions by juries on verdicts. Some populist policies, such as California's 'Three Strikes' law, have become enacted due to popular support. However, it remains unclear how close the link is between public favour and penal policy outcomes. The public may favour more punitive sanctions, but it also supports crime reduction which may be undermined by increasing penal severity. This gap between public favour and public expectation is a problem for politicians trying to win both public support and crime reduction.[6]

Consider attempts to address this gap in the United Kingdom. The British government has planned to implement greater usage of community sentences and restorative justice with tough sounding rhetoric about 'breaking' reoffending cycles and community 'pay back' in an effort designed primarily to generate significant savings as alternatives to hard treatment and its much higher costs (Ministry of Justice 2010, 2012a). These plans are correct to claim public support for criminal justice measures that are effective at crime reduction, but overlook the lack of public support for measures leading to reduced punitiveness (Dawes et al, 2011. These plans are an example where securing public confidence has importance, but it does not drive policy change. This case illustrates how the indirect expression of public opinion on sentencing matters through democratic institutions does not confirm a strong link. So perhaps a reason why there is little argument for *reducing* the public voice in sentencing matters is because the public exercises relatively modest impact.

It does not follow that the public voice should be *increased* to improve public confidence and democratic legitimacy (Thomsen 2013). The most powerful criticism is that further inclusion of public opinion may undermine just punishment. The problem is that public disapproval about sentencing decisions is known to decrease where the public has better information (Roberts et al 2012). One approach to improve public confidence is to increase public knowledge: the problem is not how criminal justice is conducted, but how little the public understands it. We require improved public education about sentencing to overcome the present crisis of low public confidence. So judges should not tailor sentencing decisions to better cohere with public opinion, but the public should be better educated about how these decisions are made in order for the public to support judges and not *vice versa* (De Keijser 2013). So the solution to the problem of the lack of public confidence in sentencing decisions might be found in improved public knowledge. Our task might be to better shape public opinion to support current sentencing decisions rather than to create a larger space for the public voice. Improving public confidence need not require us to increase the influence of public opinion.[7] If successful, this approach might secure greater public confidence without

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[6] While some argue that victim impact statements *might* influence juries to support harsher sentences (Myers et al, 2013), there is convincing evidence that sentencing *does not* become more punitive with victim impact statements (Roberts 2009).

[7] It is controversial whether or not popular decision-making is likely to lead to unsatisfactory public policy outcomes. For a powerful counterargument, see Estlund (2008). Furthermore, the idea that citizens should devote greater efforts to become better educated about criminal justice matters in order to improve public confidence may rest on an idealistic view about civic participation unlikely to be achieved (Hibbing and Theiss-Morse 2002).

sacrificing consistency and proportionality.

**II. In Defence of Public Opinion**

Increasing the impact of public opinion on sentencing outcomes faces several important challenges. The first problem is that the public lacks satisfactory information to form a justifiable judgement. The greater influence of public opinion may open the door to disproportionate punishments based upon inaccurate or incomplete relevant knowledge. A second problem is that sentencing decisions might become more arbitrary. Like cases may not be treated similarly if outcomes were less under the control of professional judges and trained lay magistrates. The third problem is that the public may be more likely to support greater sentence severity which may undermine penal goals, such as proportionality, improving crime reduction and offender rehabilitation. Public confidence is important in order to secure legitimacy, but increasing the impact of public opinion on sentencing outcomes presents us with more problems than prospects.

Overcoming these three problems requires institutional reforms where a greater public voice is exercised within clearly set parameters ensuring satisfactory consistency across similar cases. It would also entail the public gaining opportunities to acquire relevant knowledge to better inform their decisions, or what we might call the creation of an 'ontologically thick public opinion' (Dzur 2013). How to avoid arbitrariness while getting the criminal law to better track public opinion?

Restorative justice helps us identify the way forward (Braithwaite 2002, Brooks 2012a: 64-85). Restorative justice is an approach that offers an alternative to the criminal trial. Trials are adversarial and combative. In contrast, restorative justice aspires to create mutual understanding and reconciliation between offenders, their victims and the wider community. Criminal trials take place in courtrooms, but restorative justice is practised through a mediated conference. While trials are thought to produce winners and losers, restorative justice seeks to promote healing and a 'restoration' of damaged relationships.

The restorative justice conference often takes the form of either a meeting between the victim and offender or in some cases inclusive of victims' families and community representatives. Both settings are mediated by a trained facilitator operating under a professional body, such as the Restorative Justice Council. Offenders retain access to legal representation, but must admit their guilt prior to participating in a conference and offenders are expected to speak for themselves. The conference is designed to create a structured dialogue aimed at improving understanding. A standard scenario is that the facilitator begins by clarifying the meeting parameters. The victim next explains the impact a crime has inflicted on her. The offender then accounts for his crimes. This usually includes an apology to the victim. Offenders are believed to benefit from a better understanding about how their crimes have impacted their victims and the wider community. Victims are believed to benefit by hearing the offender apologize for his crimes in person (and not through legal counsel), gaining greater clarity about the offender and his reasons for offending and having a voice on the post-conference contract the offender is expected to accept.

Restorative justice is an example about how the problem of the public may be overcome. First, there are clearly set parameters for restorative conferences that help ensure consistency (Ormerod 2012, Restorative Justice Council 2011a). Conferences are facilitated by trained mediators ensuring a structured dialogue where like cases are treated similarly. Restorative conferences have the advantage of greater flexibility over the range of penal options to best fit the specific needs of offenders. Conference participants agree contracts in

about 98 per cent of cases (Shapland et al, 2006, Shapland et al, 2007: 27). Standard outcomes include requirements that offenders attend treatment to overcome substance abuse or problems with anger management, training to improve employability and life skills, and participation in community services. These are each believed to promote the 'restoration' of an offender's public status as an equal citizen.[8] If offenders fail to satisfy the terms of their contract, then a more burdensome contract may be offered or the offender can face a possible trial and a potential criminal record.

Secondly, members of the public that participate in restorative conferences are able to acquire relevant knowledge to help inform their decisions about contractual outcomes. Outcome decisions might benefit from operating with a more robust view about specific offences within the terms of the personal and wider 'social context', including a more robust account of desert (Roberts 2013). Desert is often understood within the framework of legal moralism: punishment is justified where offenders are culpable for moral wrongdoing. The more wrong the crime, the greater the deserved punishment. This understanding about desert and morality has received much criticism for its potential arbitrariness and potential incompatibility with the criminal law (Brooks 2012a: 20-26). Desert enjoys central importance for most, if not all, sentencing guidelines. We require a more compelling account that overcomes these problems. One alternative is 'empirical desert', an idea championed by Paul Robinson that identifies 'the community's intuitions of justice' discovered through 'empirical research into those factors that drive people's assessment of blameworthiness' (2008: 149).[9]

Restorative justice is able to provide an account consistent with empirical desert. Conference participants work together to clarify shared intuitions about desert concerning a specific offender. The structured setting of a restorative conference helps avoid the problem of relying on any one contested moral view about an offender might deserve in his restorative contract. Conference participants are also able to avoid the influence of media manipulation concerning relevant facts through direct engagement with the offender.

Restorative justice indicates how the problem of the public may be overcome. The first problem is that the public lacks satisfactory information to form a justifiably informed judgement. This is overcome through the constructive dialogue designed to generate improved understanding between victim, offender and the community. This avoids the concern that outcomes might be based on inaccurate or incomplete relevant knowledge. The second problem is that sentencing decisions would become more arbitrary if the public voice held greater weight. This problem is overcome through the structured conference setting facilitated by a trained mediator where contracts for the offender are tailored to his particular circumstances. The third problem is the worry that the public, if granted a greater say on outcomes, are more likely to support greater sentence severity that may threaten other penal goals. Instead, this has not been the case with most available studies about restorative justice in practice (Braithwaite 2002; Doak and O'Mahoney 2006).

Restorative justice is an approach that promotes improved public confidence while reducing offending and at reduced costs. Both victims and offenders report high satisfaction

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[8] See Ashworth 2002 and Brooks 2012a: chapter 4 for doubts about whether restorative justice achieves its aims.

[9] See Robinson and Darley1997, 2007; Robinson, et al 2010 and Robinson 2013.

with participation in restorative conferences (Sherman, et al 2008: 25-26). It might be likely that further use of restorative conferences will contribute to continued satisfaction by future participants. Restorative justice has also been found to contribute to 25 per cent less reoffending than alternatives while saving £9 for every £1 spent (Shapland, et al 2008, Restorative Justice Council 2011b).[10] If we want to improve public confidence without sacrificing crime reduction efforts and other penal goals, then restorative justice is an approach we must take seriously.[11] Restorative justice indicates how public opinion may be brought back into criminal justice and overcome the problem of the public.

**III. Sentencing by Stakeholders**

Restorative justice is hamstrung by several limitations. Restorative justice can overcome these challenges without sacrificing its attractiveness through recommended revisions that I will indicate in this section.

The first problem concerns a fundamental question about 'restoration'. Restorative justice aims at the restoration of offenders, victims and the community. The idea is that criminal offending has damaged the relationship between them. We require a process that may help restore the shared bonds of association through constructive dialogue that will yield a mutually satisfactory outcome for the relevant parties. The problem is identifying the relevant community members. Some argue, such as Andrew Ashworth, that 'the concept of restoring the community remains shrouded in mystery, as indeed does the identification of the relevant "community"' (2010: 94).[12] He says elsewhere:

> If the broad aim is to restore the 'communities affected by the crime', as well as the victim and the victim's family, this will usually mean a geographical community; but where an offence targets a victim because of race, religion, sexual orientation, etc., that will point to a different community that needs to be restored (Ashworth 2002: 583).

So the first problem is identifying the community members to be restored through restorative justice.

A second problem with restorative justice concerns conference membership. Restorative justice aims to restore the damaged relationship between victim, offender and the community. Let us suppose each party is known so we do not face the first problem of not knowing the persons to be restored. There remains problems where one or more parties are unable or unwilling to participate in a restorative conference. In practice, these conferences may proceed without the victim where he or she chooses not to attend. This is because, in part, restorative justice requires the active consent of participants: none should be coerced as this would undermine restoration. Conferences may proceed for the additional reason that some positive conclusion may result nonetheless. Perhaps the relation between victim and offender remains damaged, but there may be benefits still where offenders acknowledge their

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[10] See Latimer, Dowden and Muise (2005) on empirical studies confirming the effectiveness of restorative justice practices in reducing reoffending.

[11] See National Offender Management Service (2012).

[12] See Edwards (2006).

guilt and seek restoration with the community. The problem of who is a relevant member of 'the community' will remain. A related concern is in cases where the victim is murdered and unable to participate. Conference membership has central importance as these are the parties that need to be engaged for restoration to be achieved. It is a serious problem where we cannot identify whose participation is required.

The third problem is limited applicability. Most proponents of restorative justice defend the approach as alternative to imprisonment. Restorative justice as an approach to punishment seeks to engage participants outside the courtroom through constructive dialogue and mutual understanding that will lead to outcomes which avoid hard treatment.[13] The rejection of imprisonment by restorative justice restricts its applicability. The concern is that the public may not support alternatives to imprisonment, such as the use of restorative conferences, for offenders guilty of the more serious violent crimes (Kahan 1996, Khan 2011, Spiranovic, et al 2011). The practice of restorative justice has been generally limited to cases involving youth offenders and minor offences. Its limited applicability raises further questions about whether it can offer a theory of punishment because it may only apply to some, but not all or even most, cases.

These three limitations can be addressed together. The first challenge concerns the problem of identifying the community to be restored. I believe that we should be guided by an important principle of stakeholding: *that those who have a stake in penal outcomes should have a say in decisions about them*. Stakeholding is an idea that originates in the literature about business ethics and corporate governance (Hutton 1998; Plender 1997; Prabhaker 2004). It is meant to offer a model that improves transparency and accountability through shared responsibility and communicative dialogue. Stakeholding has direct relevance for sentencing policy. Stakeholders are those individuals with a stake in penal outcomes. These persons will include victims, if any, their support networks and local community. Each marks himself or herself out as a potential stakeholder in virtue of his or her relative stake. Stakeholders will also include offenders because they, too, have a stake in penal outcomes.

The restorative justice conference setting is a useful model for working out how stakeholding might take shape. Conference proceedings aim to achieve restoration though dialogue and the offender satisfying contractual conditions that participants agree. The idea is that the expression of apology by the offender, improved mutual understanding and completion of specified terms yields 'restoration', but we might better understand this process as promoting stakeholding. Some commentators refer to participants as 'stakeholders' and there is overlap between my account of stakeholder sentencing and standard views about restorative justice (Braithwaite 2002: 11, 50, 55). Nonetheless, the differences are crucial and reveal how restorative justice might be transformed into a more compelling account of punishment that better incorporates public opinion.

A focus on stakeholding clarifies who should be included in conference proceedings: those that have a stake in penal outcomes. This will involve those directly affected, such as

[13] Restorative justice is practised in different ways. My focus is on its use as a view about punishment and not its use post-conviction. See Miler (2011) for an insightful account about restorative justice post-conviction and McGlynn (2012) for an approach more closely related to my defence of punitive restoration below.

the victim and her support network.[14] Stakeholders bear the costs and are most affected by penal outcomes. Together, they should determine what these outcomes are within prescribed limits acceptable to the general public.

It is crucial to highlight that this focus on stakeholder decision-making does not exclude the general public. So while it is clear that members of the public may be stakeholders as victims and offenders, then general public is also a stakeholder. Stakeholding is not about the expression of the general public's judgement nor is this often possible if thought desirable (Brooks 2012a: 10-22; Hart 1968: 161). Stakeholding is instead about giving special attention to those who have a greater stake in outcomes. The general public constrains the actions of stakeholder sentencing by setting the parameters for permissible penal procedures and outcomes. So conferences are mediated by a trained facilitator to ensure procedures are sufficiently robust and offenders are entitled to legal representation as a further guarantee.[15] Furthermore, the general public might also participate as local community members or as members of a victim's support network. Neither the victim, her family or support network, the offender or others have the only say on penal outcomes. Neither does the general public. Stakeholding is about bring these different interests together in a structured way to determine penal outcomes.

If the general public is a relevant stakeholder, then it might be argued that it should have a say. The problem is that this might justify mob rule whereby penal outcomes are determined by popular vote. But not all stakeholders are similarly situated and some have a greater stake than others. For example, victims and those directly affected by crimes and their outcomes will have a larger stake and, thus, should be included in stakeholder conferences. The general public should also be included, but principally through representation, such as a few persons. So the stakeholder conference may somewhat resemble a jury in membership size. It will remain essential that its size is relatively small to better facilitate constructive dialogue and to keep focussed on the needs of those with the largest stakes.[16] This position broadly supports the widely used restorative conference model instead of victim-mediation

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[14] Other relevant stakeholders will include the offender and any support network. In practice, restorative conferences often include friends and family of the victim and of the offender, respectively, in 73% and 78% of cases examined in one study (Shapland, et al 2007: 20). Interestingly, the same study found that parents were far more likely to attend restorative conferences (50% of offenders and 23% of victims) than partners (3% of offenders and 5% of victims) (Shapland, et al 2007: 20).

[15] The involvement of legal representation might suggest the need for a judge to serve as an adjudicator. This is not current practice, but my defence of punitive restoration—administered by a trained facilitator—is not inconsistent with the facilitator's role being served by a legal professional.

[16] The general public has a stake in outcomes and so should exercise a voice. The model advocated here justifies inclusion of persons serving as representatives of the general public perhaps drawn from the local community, a common practice in restorative conferences at present. This permits members of the general public to be included while keeping conference membership to a size that is large enough to include persons with largest stakes and representative membership of the general public and small enough in size to best facilitate constructive dialogue.

meetings.[17] This is because the latter excludes community representation. The victim may have a larger personal stake than other individuals in penal outcomes, but this does not negate the stake held by the community. Both categories of stakeholders can be accommodated through the restorative justice conference. This model has proven practically workable with the additional benefit that it promotes stakeholding.

The stakeholder model broadens the applicability of the restorative conference model to endorse what I call *punitive restoration*. This is the idea that penal outcomes arising from the conference model need not always exclude imprisonment.[18] While it is clear that incarceration often makes successful crime reduction efforts more difficult, it is also clear that prisons can and should be transformed to improve their disappointing results (Liebling 2006). For example, restorative justice contracts often include an obligation on offenders to engage in developing employability and life skills as well as treatment for any drug and alcohol problems (Brooks 2012a: 66-67, 73-75).[19] There is no reason to accept that these activities could never be successfully delivered within prisons. Perhaps imprisonment should be used sparingly. This is not an argument for never using custodial sentences. It is conceivable and possible that a secure facility, such as a prison, may prove the best environment for some offenders in select cases (Perez and Jennings 2012). Furthermore, prison officers might receive additional training to become Personal Support Officers (Chapman and Smith 2011: 228). These officers have most frequent contact with imprisoned offenders and the trust that builds over time could be put to more effective use where officers provided improved pastoral support. There are then several ways in which the prison might be restructured in ways that would better enable it to foster a more conducive environment for the rehabilitation and restoration offenders than found in most prisons today. These reforms may require additional resources, but they may prove cost-effective over time in the likely, although no means certain, result of improved crime reduction.

The idea that we should make more effective use of prisons does not ignore evidence that prisons often undermine offender rehabilitation. Short-term imprisonment is often linked with high recidivism rates. This is a significant problem because most offenders receive sentences of less than 12 months and about 60% reoffend within weeks of their release.[20] There is no confirmed link between reductions in recidivisms and increased penal tariffs. In the words of Prime Minister's Strategy Unit: 'there is no convincing evidence that further increases in the use of custody would significantly reduce crime' (Carter 2003: 15; see

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[17] For a brief overview of different restorative justice models, see Restorative Justice Council, 'RJ Models: Models of Restorative Justice' (website: http://www.restorativejustice.org.uk/resource/rj_models/).

[18] Punitive restoration is a revision of restorative justice models that does not rule out the permissibility of incarceration under specified conditions where restoration would not be undermined. Punitive restoration may also be commensurate with further revisions of the mechanics of restorative justice, including improving the therapeutic potential of restorative justice (see Doak 2011).

[19] See Towl (2006) on prison-based programmes designed to better tackle drug and alcohol abuse.

[20] See Ministry of Justice (website: http://open.justice.gov.uk/home/).

Langan and Levin 2002: 2). The prison has been considered by some to be 'criminogenic' because it may contribute to more likely criminal activity post-release than if an offender had received an alternative punishment (Tonry 2011: 138, 140-41).

The lack of reformatory efforts for those serving less than 12 months sentences is a major contributing factor to the high recidivism.[21] Brief intensive interventions have been employed to address problems associated with drug use and offenders were found to benefit from 'significant gains in knowledge, attitudes, and psychosocial functioning' (Joe et al 2012). These sessions were corrections-based treatment of moderate (30 outpatient group sessions three days per week) or high intensity (six month residential treatment) has been found to yield cost savings of 1.8 to 5.7 the cost of their implementation (Daley et al 2004). Such policies indicate that prisons may be reformed to better support offender rehabilitation and improve post-release crime reduction efforts without sacrificing cost-effectiveness.

These reforms toward punitive restoration are important. This is because it is possible that the punishment of offenders guilty of more serious crimes may require more punitive outcomes than currently available to most restorative justice conferences. For example, current practice rejects the permissibility of including the threat or imposition of imprisonment in restorative contracts. In contrast, punitive restoration might find offenders in a position where they might agree to treatment and community service plus a suspended sentence that could be imposed if contractual terms are not satisfied. This option would extend the flexibility of restorative justice to address a greater range of offences in a restorative context and bypass the need for a criminal trial. Stakeholder sentencing can then identify how a restorative model might be transformed and overcome the problem of limited applicability.[22]

This transformation might be objected to on the grounds that imprisonment, even for a few days, is a major curtailment of individual liberty. Such a sanction requires special safeguards that only the courtroom can satisfy. The problem with this objection is that the overwhelming majority of offenders, and as high as 97% in Scotland, never go to trial. Most cases end in plea bargains with a judge or magistrate.[23] If it remains acceptable for more serious crimes to be punished after this process, the stakeholder model should be an attractive alternative. This is because punitive restoration would have a trained facilitator not unlike a lay magistrate conducting criminal proceedings, but with the advantages of victims gaining the satisfaction of an apology from their offender, the promotion of greater mutual understanding among stakeholders and penal outcomes better targeted to address the specific needs of offenders. Perhaps it may be contended that facilitators should receive additional training or that their role is performed by magistrates. We should also expect that, if this extension of restoration justice can continue to earn victim satisfaction, it will build and

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[21] The lack of these efforts is a major contributing factor, but I do not suggest that it is the sole or primary factor for unsatisfactory reoffending rates.

[22] The UK's Ministry of Justice has published recent proposals that aim to further embed restorative justice within the criminal justice system includes the aim for greater usage between conviction and sentencing (2012: 5). Punitive restoration can fulfill this aim and provide a means for determining a greater variety of sentencing outcomes.

[23] See Lippke (2011) for an authoritative critique of plea bargaining and Ashworth and Redmayne (2005: 6-7).

support public confidence, too (Gromet et al 2012). The stakeholder model of punitive restoration can deliver a more satisfactory outcome for victims, offenders and the wider community than the less transparent proceedings that often lead to plea bargaining.

It might be objected that punitive restoration has limited applicability even if it may be applied to far more cases than restorative justice. This is because the public will not permit its use in all cases, such as trials for murder, treason or serious sex offences. There is an increasing amount of work that argues in favour of restorative justice in cases like these (McGlynn 2011; Mills 2003). If punitive restoration improves public confidence in the punishment for most, if not all, crimes, then it represents a compelling alternative demanding greater engagement. The evidence already noted may be indicative, but it represents encouraging support for such policies that appear likely to grow as further studies are performed.

It might be further objected that stakeholder sentencing through punitive restoration would fail to treat like cases alike. The concern is that offenders convicted of similar crimes might receive different penal outcomes. If similar cases have different outcomes, then penal justice may be undermined. This objection can be met because stakeholder sentencing is about determining outcomes that better address the needs of stakeholders. There will be differences between similar cases that the restorative conference setting can discover and better target through the greater flexibility available to it. Alternatives appear more consistent at the high price of their inability to address offender needs, for example, with the outcome flexibility of punitive restoration.

Much of my argument for stakeholder sentencing above is that it is compelling because it is an improvement over alternatives. Stakeholder sentencing is also a more powerful view about the justice of punishment. So this model offers not only a compelling way to better incorporate public opinion into sentencing decisions, but also a more compelling view about justice addressing issues of both theory and practice. Thus, stakeholder sentencing may overcome concerns that misinformed public opinion is driving criminal justice policy (Page and Shapiro 1983). Stakeholder sentencing develops an important revision of restorative justice through the restorative conference model that extends its applicability and flexibility of outcomes in a way that is likely to improve public confidence, reduce reoffending and be cost-effective.

Stakeholder sentencing also represents a compelling view about penal justice. Punishment is often justified through its justifying aim or purpose, such as retribution, deterrence or rehabilitation. Philosophers have long disagreed on which principle of sentencing is best although there is general agreement that hybrid theories aiming to endorse two or more principles often suffer from inconsistency (see Brooks 2012a: 89-100). Stakeholder sentencing is one form that a *unified theory of punishment* might take because it is able to pursue multiple penal goals within a unified and coherent account.[24] For example,

[24] There are several ways such a theory might be constructed, but the one I have favoured is to view crime as a harm to individual rights and punishment as 'a response' to crime with the purpose of the protection and maintenance of rights protected by the criminal law. This model rejects the view that penalties and hard treatment have different justificatory foundations, but rather penal outcomes share a common source of justification: the protection of rights (see Feinberg 1970). The model is then able to address the fact that penal outcomes are often multidimensional and include punitive and financial elements. The idea that those

desert is satisfied because offenders must accept guilt prior to participation. The penal goals of crime reduction (including the goal of protecting the general public) and enabling offender rehabilitation are achieved through the restorative conference from the available evidence on restorative justice outcomes. Restoration is secured through the high satisfaction of participants in restorative conferences, including both victims and offenders. Stakeholder sentencing, as a unified theory of punishment, need not prioritize one penal goal over others, but it may facilitate the pursuit of several goals together. It must be emphasized that the pursuit of these goals transpires within an overall restorative framework that helps avoid conflict between principles.

**Conclusion**

Recent years have seen a growing interest in securing a greater incorporation of public opinion in sentencing decisions. This effort is thought to help produce improved public confidence about penal outcomes. This development has alarmed some because of the fear that a greater role for the public's collective voice will lead to disproportionate and overly harsh punishment. While it has been clear that public confidence in the criminal justice system is important to secure and sustain, it is much less clear how this might be achieved without sacrificing important penal principles and the rule of law.

I have argued that this problem of the public may be addressed through stakeholder sentencing. The central idea is that sentencing decisions should be made collectively by those who have a stake in penal outcomes. This model supports a greater incorporation of public opinion within specified parameters that avoid the concerns flagged by critics. Stakeholder sentencing sheds light on one way that public confidence might be secured without undermining the legitimacy of sentencing decisions. This approach is a revised and expanded account of restorative justice in what I have called punitive restoration.

The ideas of stakeholder sentencing and punitive restoration represent an important model for how we might bring the victim and others with a stake in penal outcomes back into the criminal justice system. Nils Christie rightly says: 'The victim is a particularly heavy loser . . . Not only has he suffered, lost materially or become hurt, physically or otherwise . . . But above all he has lost participation in his own case' (1998: 314). Stakeholder sentencing helps correct this unjust imbalance.

If we wish to incorporate a greater voice for the public without sacrificing judicial standards, then the idea of stakeholder sentencing deserves greater attention.[25]

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who have a stake in penal outcomes should have a say is consistent with this rights-based framework. See Brooks (2012a: 123-48) for a defence of the unified theory of punishment. See Brooks (2010, 2011a, 2011b, 2011c, 2012b) for further discussions of the unified theory of punishment.

[25] This chapter benefited enormously from the comments on earlier drafts by fellow contributors to this book, especially Richard Lippke and Paul Robinson. I am further grateful to Julian Roberts and Jesper Ryberg for additional written comments.

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